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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82

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FLOYD ERNEST HILL,

Petitioner,

- v.-

STATE OF GEORGIA,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

---

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## QUESTIONS PRESENTED

1.

(a) Whether the use for impeachment purposes of petitioner's silence, at the time of arrest and after he received Miranda warnings, violated the due process clause of the fourteenth amendment?

(b) Whether four separate and distinct references for impeachment purposes to petitioner's silence, at the time of arrest and after he received Miranda warnings, can be found to be harmless error beyong a reasonable doubt under the facts of this case?

## TABLE OF CONTENTS


Questions Presented ..... 1

Citation to Opinion Below ..... 1

Jurisdiction ..... 1

Constitutional Provisions Involved ..... 2

Statement of Case ..... 3

The Use of Petitioner's Post-Arrest Silence at Trial ..... 4

How the Federal Questions Were Raised and Decided Below ..... 9

Reasons for Granting the Writ .....

A. The Court Should Grant Certiorari to Consider Whether There can be a "Harmless Error" Exception to the Constitutional Proscription Against the Use for Impeachment of the Post-Arrest/Post-Miranda Warnings Sleence of the Accused..... 13

B. The Court Should Grant Certiorari to Consider Whether, under all the facts and Circumstances of this Case, the Use of Petitioner's Post-Arrest/Post-Miranda Warnings Silence for Impeachment can be Found to be Harmless Error Beyond a Reasonable Doubt..... 13

Conclusion ..... 17

Appendix A ..... 18

## TABLE OF CASES


| | Page |
|---|---|
| Chapman v. United States, 547 F2d 1240 (5th Cir. 1977) ..... | 12,13,15,16 |
| Doyle v. Ohio, 426 U. S. 610 (1976)..... | 14, 15 |
| Miranda v. Arizona, 384 U. S. 456 (1966) ..... | 10,12,13,14 |

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Petitioner FLOYD ERNEST HILL respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in this case.

## CITATION TO OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at ____ Ga. ____, 295 SE2d 518 (Ga. 1982) and is attached hereto as Appendix A.

## JURISDICTION

The judgment of the Supreme Court of Georgia was entered on October 5, 1982. A timely petition for rehearing was denied on November 29, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States, which provides in relevant part:

> "No person ... shall be compelled in any criminal case to be a witness against himself . . . .";

the Sixth Amendment, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . . to have the assistance of counsel for his defence.";

and the Fourteenth Amendment, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

## STATEMENT OF CASE*/

On the evening of Sunday, February 8, 1981, Officers Thames and Mullinax of the Austell, Georgia, Police Department responded to a radio call reporting a domestic disturbance with a man armed on Paper Mill Road of that city. (T-545) The officers responded to the call and encountered "...a group of people in the street. There was an argument going on between a male and female. Officer Mullinax was driving the car. He stepped out of his side of the car and went straight towards the male. I stepped out of my side and went to the female...." (T-546) The officers became engaged in a hand-to-hand struggle with three persons in the street. (T-547, 548) Suddenly, Officer Thames heard, "Officer Mullinax yelled to watch out....I heard Officer Mullinax yell a second time to watch it. At this point, I heard one shot, and then it sounded like a string of fire-crackers...and everybody scattered...I saw Officer Mullinax standing in the street. He had already been hit. He staggered several feet and then fell in front of the patrol car." (T-549) The entire sequence of events, from the radio call to the shooting, took less than three minutes.

Detective John Seay of the Cobb County, Georgia, Police Department was the chief investigator on the case, and was in charge of the crime scene that night. Detective Seay testified that he followed a blood trail from the scene which eventually led through a nearby residence and to petitioner, Floyd Ernest Hill, who was collapsed on the ground about 100 yards behind his residence, approximately 200 yards from the scene of the

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*/ Each reference to the transcript of petitioner's trial in the Superior Court of Cobb County will be indicated by the letter "T" followed by the page on which the reference may be found.

shooting. (T-816-822) Detective Seay arrested petitioner and Floyd Ernest Hill was subsequently indicted for the murders of Officer Mullinax and a "bystander", Darryl Toles.

On July 21, 1981, petitioner was convicted of the murders of Officer Greg Mullinax and Darryl Toles, and on July 22, 1981, the jury imposed the death penalty for the murder of Officer Greg Mullinax and life imprisonment for the murder of Darryl Toles. Petitioner's conviction and sentence of life imprisonment for the murder of Darryl Toles were reversed by the Supreme Court of Georgia on October 5, 1982. Hill v. State, 295 S.E.2d 518 (Ga. 1982). Petitioner's conviction and sentence to death for the murder of Officer Greg Mullinax were affirmed by the Supreme Court of Georgia. This petition follows.

## THE USE OF PETITIONER'S POST-ARREST SILENCE AT TRIAL

On July 8, 1981, the trial court convened a pre-trial hearing to consider several motions presented by defense counsel, among them a Motion in Limine (PT-11). The Motion in Limine sought to preclude the prosecution from introducing into evidence any testimony as to "...any alleged statement by defendant requesting assistance of counsel prior to giving any statements to investigating officer." Following the pre-trial hearing, the trial court issued an order that "...the state be precluded from attempting to introduce evidence or testimony as to...any alleged statement by the accused to the effect that 'I won't say anything until I talk to my lawyer'".

During the direct examination by the district attorney of Detective John Seay, the chief investigationg officer in this case, the following colloquy occurred:

"By Mr. Charron:

> Q. Now, when you and the other officers located Floyd Hill lying in the woods, you said that he was conscious. Did you have an opportunity to talk with Mr. Hill at that time?
>
> A. Yes, I did.

Q. Would you please tell us what you said, if anything, first, and what was said?

A. I asked him his condition first off, his physical condition.

MR. JOHNSON: Your Honor, I object to anything he may have said to Mr. Hill.

THE COURT: I will allow it over an objection.

MR. CHARRON: Thank you.

By MR. CHARRON:

Q. Go Ahead.

A. I asked him his physical condition.

Q. What did he say?

A. He said that he was shot.

Q. Did you give Mr. Hill any Miranda warnings at that time?

A. Yes. I first looked to see how badly he was wounded, and it didn't appear to be critical, so I began....first off, we called for an ambulance to transport Mr. Hill to the hospital, and then as we were waiting for this ambulance to arrive, I advised Mr. Hill of his rights orally.

Q. What rights did you advise him of?

A. I advised Mr. Hill that he had the right to remain silent.

THE COURT: Excuse me. I would like for you, if you would, to get, to give it to the court as verbatim as you can. I would like to have them just as you gave them to him, as verbatim as you remember.

THE WITNESS: Yes, sir.

MR. JOHNSON: May it please the court so we won't have any interruption, I would like to approach the bench.

THE COURT: Sure. I will give you a continuing objection if you like, Mr. Johnson.

MR. JOHNSON: Your honor, so that we can avoid a mistrial, since we have an order on this point if your honor recalls, an order on this point....

THE COURT: I understand that. He is not going to say anything like that because I have got an order. I issued an order.

MR. JOHNSON: I just wanted to make sure. (Side bar comments on other matters omitted) (Whereupon the conference at the bench was terminated)

THE COURT: Alright. Go ahead, now, and state verbatim insofar as you can exactly what you told Mr. Hill.

THE WITNESS: I advised Mr. Hill that he had the right to remain silent, that anything that he was going to say could be used against him in court. I advised him that he had the right to an attorney and to have him present during questioning, and if he could not afford one, the court would appoint him one. I also advised him that if he did choose to answer my question, to answer any questions, he could stop answering questions at any time until a lawyer was appointed, and then I asked him if he understood and he said, "Yes, he did."

By MR. CHARRON:

Q. Now, basically, what type of conversation did you have with him at that point?

A. Well, naturally I asked him, "What had happened?"

Q. What was his response?

A. His response was nil. He did not give a response.

Q. Did you have any other conversations that did not have to do....

MR. JOHNSON: Your honor, I would like to approach the bench.

THE COURT: Well, let me say this. Now, ladies and gentlemen of the jury, I have already touched on this but I want to say this, "Under no circumstances, as I have told you, is a defendant required to say anything at any time. Under no circumstances does the defendant have any burden of proof whatsoever in a criminal case. Y"all understand that, don't you? (All twelve jurors nod heads affirmatively.)

THE COURT: It is perfectly within any defendant's legal rights and privileges to decline to say anything, and certainly in this instance where he was injured, so I don't want any unfavorable inferences to be drawn in any way, form or fashion by virtue of the statement of this witness, that he declined to say anything further. Do you all understand that fully? If you do, nod your heads in the affirmative. I want to see that you fully understand that. (All twelve jurors nod heads affirmatively.)

THE COURT: Alright.

By MR. CHARRON:

Q. Sgt. Seay....

MR. JOHNSON: Your honor....

THE COURT: Would you rather perfect the record later on, Mr. Johnson?

MR. JOHNSON: Yes, I'll do that, in light of...

THE COURT: I'll give you a full opportunity.

MR. JOHNSON: Thank you, your honor.

By MR. CHARRON:

Q. Sgt. Seay, did you have a conversation with Mr. Hill while you were waiting for the ambulance not concerning any crime scene or investigation that you were conducting?

A. Yes, sir. I asked him if he was in great pain, and he said, "Yes, my arm hurts", and I told him that the ambulance would be there in a little bit and would take him and get him treated, and he asked me for a cigarette, which I found him a cigarette and gave it to him and at that time he stated that he wanted his lawyer." (T-827-832)

After the lunch recess, which occurred minutes later, petitioner's motion for mistrial was denied. (T-832-843)

Petitioner Floyd Ernest Hill took the stand in his own behalf, stating that he had no gun on his person down at the crime scene and that he did not shoot any gun at all that night. Mr. Hill stated that he was shot himself through the shoulder and forearm, but that he could not determine who had shot him. The accused stated that he had walked up to his house after the shooting had stopped seeking help. While sitting in his bedroom, Mr. Hill testified that he was confronted by one Edward Saffo, the original "man with a gun" to whom the police radio call was directed, and Mr. Saffo was carrying a rifle. Petitioner testified that he reached under the mattress of his bed and got a .32 automatic for protection from Mr. Saffo. Mr. Hill stated that he then left his home in a state of confusion and passed out in the copse of woods behind his home. (T-1065-1071).

Police officers testified that a .32 caliber pistol was found under Mr. Hill in the woods (T-824), but no spent rounds were found in that weapon (T-826) and that gun was never matched to any projectiles found at the scene or on the persons of the victims. (T-977). Earlier, during the testimony of a chemist from the Georgia State Crime Laboratory, it was established that an analysis of swabbings from the petitioner's hands was "... negative for metals associated with gunshot residue." (T-1048). Hand wipings from the hands of the "bystander", Darryl Toles, were positive for metals associated with gunshot residue. (T-1051, 1052).

During the cross-examination of petitioner Floyd Ernest Hill there occurred the following:

> BY THE DISTRICT ATTORNEY, MR. CHARRON:
>
> Q. Mr. Hill, you testified that you carried the .32 revolver. Is this the one that you carried into the woods?
>
> A. The automatic, yes.
>
> Q. Why did you carry this into the woods?
>
> A. Because I had it pointed towards Saffo and I did not know what Saffo had on his mind, going for me, and nothin. I just had it for protection.
>
> Q. Did you ever try to explain all of this to anybody before today? (Emphasis added)
>
> MR. JOHNSON: Your honor, I am going to make an objection to that.
>
> THE COURT: I sustain the objection, ladies and gentlemen of the jury. Disregard the last question. Do y'all understand that" He is under no duty to explain." (T-1084).

After the close of the evidence, the District Attorney made the following remarks in his closing arguments to the jury:

> "....you will see some marked differences as to what the defense originally said in the trial and how it changed and reacted to testimony as the trial progressed, and I think that is very important, because at the end, that will explain something that we call rebuttal witnesses, and why the state holds back some witnesses....(T-1187) now, what would have happened, I submit to you, ladies and gentlemen, if we had put the fishnet up first before Floyd Hill had testified, what would we have done if we had put up that evidence showing that every shot was fired from the front? What would his story have been? (T-1213) Why didn't we put that up originally? Well, what would Floyd say again. (T-1215) .... when it came down to the defense, who doesn't have to put up any evidence....that's right. They don't have to ever say a word, but when it came down to the defense giving a story, what happened? Who testified as an eyewitness? Floyd Hill. (Emphasis added). (T-1224)

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner first raised the issue of use of his post-arrest silence by the filing of a Motion in Limine (Transcript of Pre-trial Hearing, T-11 et seq.) seeking to preclude the prosecution from introducing any testimony or evidence as to "Any alleged statement by Defendant requesting assistance of counsel prior to giving any statements to investigating officers." Petitioner's counsel requested that the trial court order the District Attorney to instruct his witnesses not to comment on the post-arrest silence of the accused. The trial court thereafter entered an order that provided "...the State be precluded from attempting to introduce evidence or testimony as to...Any alleged statement by the accused to the effect that 'I won't say anything until I talk to my lawyer.'".

During his trial, petitioner, in addition to the continuing objection created by Georgia law by the entry of the trial court's order pursuant to Petitioner's Motion in Limine, objected in a timely manner to each of the prosecutor's references to the post-arrest silence of the petitioner. First, petitioner, through his counsel, objected to the investigating officer's relating any conversation with the accused at the time of his arrest, and the trial court overruled said objection. (T-828) Then, the question was asked, "What rights did you advise him of?", and the answer given, "I advised Mr. Hill that he had the right to remain silent." Petitioner's counsel then asked to approach the bench, and the trial court offered a "continuing objection"; whereupon, the following conference at the bench transpired:

> "Mr. Johnson: Your honor, so we can avoid a mistrial, since we have an order on this point if your honor recalls, an order on this point--
>
> The Court: I understand that. He is not going to say anything about that he declined to say anything or anything like that. He's not going to say anything like that, because I've got an order. I issued an order." (T-829)

Undaunted, the prosecutor proceeded to elict the first reference to petitioner's post-arrest silence as follows:

> Q. Now, basically what type of conversation did you have with him at that point?
>
> A. Well, naturally, I asked him what happened.
>
> Q. What was his response?
>
> A. His response was nil. He did not give a response.
>
> Q. Did you have any other conversations that did not have to do-- (T-830)

Petitioner's counsel asked to approach the bench, and the trial court then gave "curative instructions", as set out hereinabove. The trial court also offered counsel an opportunity to "perfect the record" later on, which counsel accepted.

The prosecutor then resumed his questioning of the investigating officer:

> Q. Sergeant Seay, did you have a conversation with Mr. Hill while you were waiting for the ambulance, not concerning any crime scene or investigation that you were conducting?
>
> A. Yes, sir. I asked him if he was in great pain, and he said yes, his arm hurt, and I told him that the ambulance would be there in a little bit and would take him and get him treated, and he asked me for a cigarette, which I found him a cigarette and gave it to him, and at that time he stated that he wanted his lawyer. (T-832)

Petitioner's counsel made an immediate objection, with the trial court reserving for counsel the opportunity to correct the record without sending the jury out immediately, and the witness testified for some few more minutes until the lunch recess. At the end of the lunch recess, petitioner had his first opportunity to move for a mistrial, and he did so. Petitioner's motion was denied, and, more than two hours after the impermissible comment on the silence of the accused, the jury was given more "curative instructions". (T-832-859)

The next reference to the silence of petitioner after his arrest and the recitation of Miranda warnings came during the cross-examination of petitioner, when, in regard to petitioner's exculpatory testimony the prosecutor asked, "Did you ever try to explain all of this to anybody before today?"(T1084)

An immediate objection by petitioner's counsel was sustained, with the comment, "He's under no duty to explain." (T-1084)

The final reference to the post-arrest silence of the petitioner occured during the prosecutor's closing argument, wherein he stated, "...when it came down to the defense, who doesn't have to put up any evidence--that's right. They don't have to ever say a word, but when it came down to the defense giving a story, what happened? Who testified as an eyewitness? Floyd Hill." (T-1224) No objection was made by petitioner, but the Motion in Limine and the trial court's order, in addition to the trial court's statements from the bench during the trial, had given counsel a continuing objection to the use of petitioner's post-arrest silence for impeachment.

On appeal to the Supreme Court of Georgia, petitioner alleged, among others, the following enumerations of error:

"5.

> The Trial Court erred in refusing to grant Defendant's motion for mistrial when the State's witness, Detective John Seay, on direct examination testified that the Defendant was given his Miranda warning and refused to make any statement.

6.

> The Trial Court erred in refusing to grant Defendant's motion for mistrial when the State's witness, Detective John Seay, on direct examination testified that the Defendant stated in response to questioning after being given the Miranda warning that he wanted to talk to his lawyer.

7.

> The Trial Court erred in not granting a mistrial when the District Attorney, on cross-examination of the Accused, commented on the silence of the Accused after he was given Miranda warnings and directly linked the silence of the Accused to his exculpatory story.

8.

> The Trial Court erred in not granting a mistrial or in not granting a new trial upon Defendant's motion for the same, in that the District Attorney's repeated violations of the Trial Court's pretrial Order pursuant to the Defendant's motion in limine which directed the prosecutor to refrain from attempting to introduce evidence or testimony about any alleged statement of the Accused to the effect that "I don't want to say anything until I talk to my lawyer." so prejudiced the

rights of the Defendant as to demand a new trial." In his "Brief for the Appellant/Defendant", petitioner fully recited all portions of the transcript of his trial which point to his silence after arrest and receipt of Miranda warnings. This Court's opinion in Doyle v. Ohio, 426 U.S. 610 (1976) was cited to the Georgia Supreme Court as authority for the reversal of petitioner's conviction and sentence of death.

The Supreme Court of Georgia rejected the petitioner's claim, although that court found, by its own count, three clear references to the silence of the petitioner. The Georgia high court concluded, "Although more than one reference was made to appellant's (petitioner's) pre-trial silence during the presentation of the evidence, under the circumstances of this case we do not find repeated deliberate violations of Miranda v. Arizona, supra, or Doyle v. Ohio, supra." Hill v. State, 295 SE2d 5__ (Ga. 1982), Appendix A, Slip Opinion at 11. The Georgia court noted that "The evidence in this case, if not overwhelming, was quite strong. See U. S. v. Smith, supra. In view of all the foregoing, we conclude that the curative instructions given were sufficient to render the error harmless beyond a reasonable doubt. See, U. S. v. Kaplan, 576 F2d 598 (5th Cir. 1978); U. S. v. Fairchild, 505 F2d 1378 (5th Cir 1975)." Hill v. State, 295 SE2d 5__ (Ga. 1982), Appendix A, Slip Opinion at 12. Regarding the prosecutor's directly tying the exculpatory story of petitioner to his post-arrest/post-Miranda warnings silence in a manner almost identical to that used by the prosecutor in Doyle v. Ohio, supra, the Georgia Supreme Court merely commented, "The third reference came much later in the trial and was an unanswered question, the objection to which was immediately sustained, with curative instructions. See Smith v. State, supra." Hill v. State, 295 SE2d 5__ (Ga. 1982), Appendix A, Slip Opinion at 11.

## REASONS FOR GRANTING THE WRIT

A. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THERE CAN BE A "HARMLESS ERROR" EXCEPTION TO THE CONSTITUTIONAL PROSCRIPTION AGAINST THE USE FOR IMPEACHMENT OF THE POST-ARREST/POST-MIRANDA WARNINGS SILENCE OF THE ACCUSED.

B. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER, UNDER ALL THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE USE OF PETITIONER'S POST-ARREST/ POST-MIRANDA WARNINGS SILENCE FOR IMPEACHMENT CAN BE FOUND TO BE HARMLESS ERROR BEYOND A REASONABLE DOUBT.

The facts of this case present to this Court, in the context of a case wherein the death penalty has been imposed, an important issue not resolved expressly by this Court's opinion in Doyle v. Ohio, 426 U.S. 610 (1976): whether the use for impeachment purposes of the post-arrest/post-Miranda warnings silence of the accused can be found to be harmless error beyond a reasonable doubt in any case; and, if so, what standards apply to a determination of harmlessness.

In Doyle itself, this Court found harmful error in the prosecutor's use for impeachment of Doyle and Woods' silence after arrest and Miranda warnings, even though their exculpatory story could only be described by this Court as "not entirely implausible", Doyle at 613. The prosecutor in Doyle cross-examined the accuseds, at their respective trials, with such questions as "And I assume you told him all about what happened to you?" and "But in any event you didn't bother to tell Mr. Beamer anything about this?", Doyle at 613, 614. The Doyle prosecutor went on to comment on the silence of the accuseds and their exculpatory testimony in his closing argument. Doyle at 615, n 5.

The instant case presents a record reinted from beginning to end with repeated violations of the Doyle holding. First, petitioner, recognizing the inherent prejudicial effect of impeachment use of the silence of the accused after arrest, moved in limine to restrict the prosecutor from presenting any such testimony in the presence of the jury. As set out above,

the trial court recognized the impermissibility of such tactics, and issued an order restricting the prosecutor from even attempting to introduce such testimony. The trial court went so far as to order the prosecutor to instruct his witnesses on the effects of the court's order. The efforts of petitioner's counsel and the trial court went for nought, however, as set out hereinabove. With the chief investigating officer on the witness stand there occurred this sequence of events: Question, Objection; Question, Objection; Conference at the bench; Question, Objection; Curative Instructions; Renewed Objection; Question, Objection; Question, Objection; Curative Instructions. (T-828-857). It cannot be gainsayed that this series of questions, objections and rulings by the trial court served only to highlight and call the attention of the jury to the silence of petitioner after arrest and Miranda warnings. Illustrative of the trial context, and of the tight rope that petitioner's counsel was walking in his efforts not to unduly highlight the issue for the jury, while at the same time preserving this gross error for appellate review, is the fact that counsel felt compelled, after denial of his motion for mistrial, to request that the trial court reserve any further curative instructions until its final charge to the jury. The trial court refused. (T-857)

It was during the cross-examination of petitioner that the prosecutor directly linked the silence of the accused with his exculpatory story, a la Doyle. The District Attorney asked, "Did you ever try to explain all of this to anybody before today?" (T-1084) It is respectfully submitted that, irrespective of whether this Court finds there to be a "harmless error exception" to its holding in Doyle, this direct linkage of petitioner's silence and his exculpatory story demands reversal of his conviction and sentence of death. The lower Federal courts which have found there to be a harmless error exception to Doyle have followed the ruling of the Fifth Circuit Court of Appeals in Chapman v. United States, 547 F2d 1240 (5th Cir. 1977)

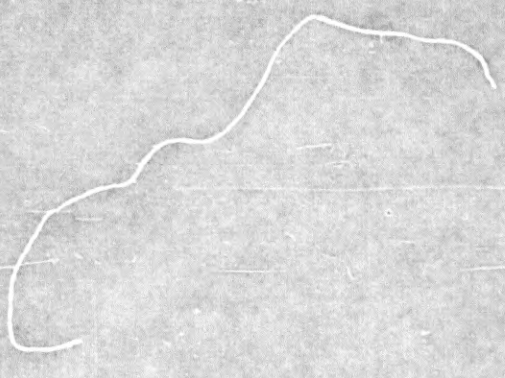
In Chapman, the Fifth Circuit concluded that Doyle violations, for purposes of a harmless error test, should fall into three categories:

> (1) When the prosecution uses defendant's post-arrest silence to impeach an exculpatory story offered by defendant at trial and the prosecution directly links the implausibility of the exculpatory story to the defendant's ostensibly inconsistent act of remaining silent, reversible error results even if the story is transparently frivolous.
>
> (2) When the prosecutor does not directly tie the fact of defendant's silence to his exculpatory story, i. e. when the prosecutor elicits that fact on direct examination and refrains from commenting on it or adverting to it again, and the jury is never told that such silence can be used for impeachment purposes, reversible error results if the exculpatory story is not totally implausible or the indicia of guilt not overwhelming.
>
> (3) When there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to the silence of the accused is harmless error. Chapman at 1249-50.

It is clear that petitioner's case falls into the first category when the prosecutor's question, "Did you ever try to explain all of this to anybody before today?", is considered in its context of cross-questioning regarding petitioner's exculpatory story. In any event, as even the Georgia Supreme Court recognized, petitioner's exculpatory story was not transparently frivolous and the indicia of guilt was not overwhelming, so that reversal would follow even upon application of the second standard.

Petitioner recognizes that in Doyle this Court expressly reserved the issue of harmless error because the state had failed to argue that the violation was harmless error. Doyle at 618-619. It is respectfully submitted that should this Court find that a harmless error exception exists in the Doyle context, that the standards set out in Chapman provide the stringent safeguards for the rights of the accused that are necessary to make those rights more than an abstraction in the courtroom. In light of the clear and repeated violations of due process found in this case, including the prosecutor's closing remarks as set out hereinabove, petitioner respectfully

seeks certiorari from this Court. Further, petitioner respectfully submits, in light of the clear violations in this case, that either summary reversal of his death sentence, or vacation of his sentence with a remand for reconsideration in light of Doyle v. Ohio, supra, is warranted.



## CONCLUSION

For the reasons hereinabove specified, petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

MIKE TREADAWAY

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DATED: January 26, 1983

Marietta, Georgia